A

MOHD HANIS MOHD NASIR & ANOR v. PP

HIGH COURT MALAYA, TAIPING
MOHAMED ZAINI MAZLAN JC
[CRIMINAL APPEALS NO: 42S-01-01-2015 & 42S-02-01-2015]
4 JANUARY 2016

B

CRIMINAL PROCEDURE: *Sentence – Appeal against sentence – Rape – Minor – Offenders aged 19 and 17 when offence committed – Whether ought to be categorised as youthful offender and child – Offenders reached age of maturity by time of appeal – Whether consent of victim relevant – Whether punishment reflected severity of offence – Character report by Welfare Department produced at appeal – Whether should have been made available before sentencing at trial court – Whether sentence manifestly excessive – Child Act 2001, ss. 2, 9(1)(b) & 96(2) – Criminal Procedure Code, s. 293*

C

D

The appellants were jointly tried at the Sessions Court for two charges of rape under s. 376 of the Penal Code and were found guilty of both charges. They were both sentenced to 15 years imprisonment and five strokes of whipping for each charge and the sentences for each charge were ordered to run concurrently. They were also ordered to be put under police supervision for one year pursuant to s. 295(1A) of the Criminal Procedure Code ('CPC'), from the date of completion of their sentences. Hence, the appeal by the appellants. The first appellant submitted, *inter alia*, that (i) as he was 19 years old at the time of commission of the offence, he should be regarded as a youthful offender under s. 2 of the CPC; and (ii) the sentence passed by the Sessions Judge was manifestly excessive, as he should have referred to s. 293 of the CPC. The second appellant contended that: (i) he was 17 years old when he committed the offence and thus ought to be categorised as a child, pursuant to s. 2 of the Child Act 2001 ('Child Act'); and (ii) the Sessions Court should have sentenced him pursuant to the provisions of the Child Act as s. 96(2) of the Child Act provides that a child aged 14 years and above should not be imprisoned, if he can be dealt with suitably, whether by probation, fine, or sent to a place of detention or and approved school. During appeal, the second appellant also submitted a 'character report' by the Welfare Department which, *inter alia*, recommended that the second appellant be bound over for good behaviour pursuant to s. 9(1)(b) of the Child Act.

E

F

G

H

Held (dismissing appeals; maintaining decision of Sessions Court):

(1) An appellate court should be slow to interfere with the sentence passed by the trial court, unless it was manifestly wrong, in the sense of being illegal or being unsuitable to the proved facts and circumstances. It is not sufficient for the court hearing the appeal to interfere, on the mere fact that it would have passed a different sentence from the trial court. (para 23)

I

(2) The appellants were both 24 and 22 years old, respectively, when sentenced and had spent close to a year in prison, by the time of the appeal. As both appellants had reached the age of maturity, it would be an exercise in futility to consider any relevant provisions pertaining to youthful offender or a child. (paras 24 & 25)

(3) No case could be set as a fixed barometer for any crime and decided cases should be used as guideline, such as observing the trend of sentencing. The discretion however lies with the sentencing court and depended on many variable factors unique to each case. Rape is a most heinous crime, as it is committed against the weaker gender and it is viler when committed against a minor. The punishment must reflect the severity of the offence. Further, sex with a minor is a crime and consent should not vitiate the gravity of the crime. Hence, the appellants' insinuation that the victim was a voluntary participant carried little weight. (paras 26, 28 & 29)

(4) Rape against minor has seen an upsurge in recent times. It is worrying that some the acts were consensual. A message must be sent out to the public, that statutory rape would result in heavy sentence so that it would deter others from considering of committing the crime. (para 31)

(5) The welfare report should have been done and made available before the sentencing by the Sessions Court. To produce it at the appeal stage lent little weight as the trial court did not have the opportunity to consider it before passing down the sentence. (para 34)

Case(s) referred to:
Nor Afizal Azizan v. PP [2012] 6 CLJ 370 CA ***(refd)***
Peilis Sami v. PP [2014] 6 CLJ 670 CA ***(refd)***
PP v. Mohamed Nor & Ors [1985] 1 LNS 25 SC ***(refd)***
R v. Kenneth John Ball [1951] 35 Cr App R 164 ***(refd)***

Legislation referred to:
Child Act 2001, ss. 2, 91(1)(b), 96(2)
Criminal Procedure Code, ss. 2, 293(1)(b), (e), 295(1A)
Penal Code, s. 376

For the appellants - P Ravee; M/s P Ravee & Co
For the respondent - Mohd Amril Johari; DPP

Reported by S Barathi

JUDGMENT

Mohamed Zaini Mazlan JC:

Introduction

[1] Both appellants were jointly tried at the Kuala Kangsar Sessions Court, for two charges of rape under s. 376 of the Penal Code ('PC'). They were found guilty for both charges.

[2] The Sessions Court sentenced both appellants to 15 years imprisonment, and five strokes of whipping for each charge. The sentences for each charge were ordered to run concurrently from the date of the decision, which was on 3 December 2014. They were also ordered to be put under police supervision for one year, pursuant to s. 295(1A) of the Criminal Procedure Code ('CPC'), commencing from the date that their sentences have been completed.

[3] Both appellants had appealed to this court against the conviction and sentence. However, they only sought to pursue their appeal against the sentence during the hearing of their appeal. Their appeals were subsequently dismissed, and the Sessions Court's decision maintained.

[4] The first appellant in Appeal No. 42S-02-01-2015, Mohd Hanis bin Mohd Nasir, shall be referred to as the first appellant, and the second appellant, XXX in Appeal No. 42S-01-01-2015, shall be referred to as the second appellant.

The Charges

The First Appellant

[5] There were two amended charges against the first appellant, which in Bahasa Malaysia were as follows:

First amended charge

Bahawa kamu pada 31.10.2009 di antara jam lebih kurang 9.30 malam hingga 10.30 malam di atas beranda di sebuah rumah di Kampung Pulai Ara Panjang 33800 Manong di dalam daerah Kuala Kangsar di dalam Negeri Perak telah melakukan kesalahan rogol ke atas penama xxx (No. KPT: xxx) berumur 15 tahun 7 bulan pada ketika kejadian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 376(1) Kanun Keseksaaan.

Second amended charge

Bahawa kamu pada 1.1.2009 di antara jam lebih kurang 1.30 pagi hingga 5.11.2009 jam lebih kurang 8.30 pagi di sebuah rumah kosong di No. 115 Kampung Jeliang Jalan Baru 33800. Manong di dalam daerah Kuala Kangsar di dalam Negeri Perak telah melakukan kesalahan rogol ke atas penama xxx (No. KPT: xxx) berumur 15 tahun 7 bulan pada ketika kejadian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 376(1) Kanun Keseksaaan.

The Second Appellant

[6] The two amended charges in Bahasa Malaysia against the second appellant, were as follows:

First amended charge

Bahawa kamu pada 31.10.2009 di antara jam lebih kurang 9.00 malam hingga 9.30 malam di atas beranda di sebuah rumah di Kampung Pulai Ara Panjang 33800 Manong di dalam daerah Kuala Kangsar di dalam

Negeri Perak telah melakukan kesalahan rogol ke atas penama xxx (No. KPT: xxx) berumur 15 tahun 7 bulan pada ketika kejadian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 376(1) Kanun Keseksaaan.

Second amended charge

Bahawa kamu diantara 1.1.2009 di antara jam lebih kurang 12.00 tengah malam hingga 5.11.2009 jam lebih kurang 5.00 pagi di sebuah rumah kosong di No. 115 Kampung Jeliang Jalan Baru 33800 Manong di dalam daerah Kuala Kangsar di dalam Negeri Perak telah melakukan kesalahan rogol ke atas penama xxx (No. KPT: xxx) berumur 15 tahun 7 bulan pada ketika kejadian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 376(1) Kanun Keseksaan.

The Appeal

[7] It would be convenient to refer to each appellant's appeal distinctly, for reasons that will become apparent. I shall address the grounds submitted for each appellant in turn.

First Appellant

[8] He was 19 years old at the time he committed the offences. His counsel submitted that the first appellant should be regarded as a youthful offender pursuant to s. 2 of the CPC, which defines a youthful offender as "a person convicted of an offence punishable by fine or imprisonment who is of or above the age of eighteen and below the age of twenty-one".

[9] Counsel submitted that the sentence that was passed by the learned Sessions Court Judge ('SCJ'), was manifestly excessive, as he should have referred to s. 293 of the CPC. The first appellant's counsel was of the view, that had the learned SCJ, instead of imprisoning the first appellant, could have bound him over for good behaviour under s. 293(1)(b), or ordered to perform community service under s. 293(1)(e). Counsel surmised that this would be more beneficial to the first appellant and the public.

[10] Learned counsel referred to the Court of Appeal's decision in *Nor Afizal Azizan v. PP* [2012] 6 CLJ 370. In that case, the appellant was 19 years old, and the victim 13 years old when the rape was committed. The Sessions Court had placed the appellant on a bond in the sum of RM25,000 for good behaviour, for a period of five years. The learned SCJ was of the view, that the appellant deserved a second chance, since the sexual encounter was consensual and involved no violence, and that the appellant was a first and young offender, and had shown genuine remorse. Furthermore, the learned SCJ opined that the appellant has a bright future in life.

[11] The learned SCJ's view was however not shared by the High Court on appeal. The sentence imposed by the Sessions Court was substituted with a term of imprisonment of five years. This was however, reversed by the Court of Appeal, which then reinstated the Sessions Court's sentence.

A *Second Appellant*

[12] The second appellant was 17 years old when he committed the offence. His learned counsel submitted that the second appellant is categorised as a child, pursuant to s. 2 of the Child Act 2001 ('CA 2001'), which defines a child as a person who is under the age of 18 years.

B

[13] Learned counsel submitted that the Sessions Court should have sentenced the second appellant, pursuant to the provisions under the CA 2001, as s. 96(2) of the CA 2001 provides that a child aged 14 years and above, should not be imprisoned, if he can be dealt with suitably, whether by probation, fine, or sent to a place of detention, or an approved school.

C

[14] In urging this court to interfere with the sentence imposed by the Sessions Court, learned counsel submitted that the second appellant was a first offender, and that his crime was driven by lust, and that he was not a habitual offender. Learned counsel puts the blame on the ills of society and lack of supervision by his parents, for the second appellant's misdemeanour.

D

[15] A 'character report' by the Welfare Department was also submitted during the appeal. I must state that this report was only made during the course of the appeal, and that there was none prepared, nor tendered at the Sessions Court.

E

[16] In gist, the report stated that the second appellant comes from a broken family, as his father did not take any interest in him, and his family, ever since he married another. The second appellant is the fifth out of seven siblings, and was primarily brought up by his mother, who suffers from diabetes, and undergoes dialysis treatment thrice a week. The second appellant left school at 15, and had stayed home doing menial jobs in the village. He had also married in 2013, and has a child who suffers from a nerve disease. Detailed in the report was the second appellant's feeling of remorse, and desire to be given another chance in life. He also wishes to be an abiding husband and father.

F

G

[17] The welfare officer concluded his report, by recommending that the second appellant be bound over for good behaviour, for a period of two years pursuant to s. 91(1)(b) of the CA 2001, and that he be compelled to report to the police station in Manong, Kuala Kangsar, once a month, until the completion of his sentence.

H

Other Factors

[18] Learned counsel for both appellants submitted, that the learned SCJ had also failed to take into consideration some other factors. He contended that the victim was of a loose character, and has had sexual intercourse with her boyfriend and others prior to the offence. He surmised that the victim knew what she was getting herself into, as there was no evidence of her

I

attempting to resist or run away. Learned counsel highlighted the fact, that this offence had only came to light, after the victim's father had lodged a police report, and that it was not at the behest of the victim.

[19] Learned counsel for both appellants had urged this court not to commit the appellants to prison, as they would be mixing with other convicts, and stood in danger of being influenced by the other hardened criminals.

Findings

[20] The learned SCJ had merely set out the submissions by learned counsel for the appellants' counsel and the learned Public Prosecutor pertaining to the sentencing in his judgment. He did not indicate his views, and had only mentioned the sentences passed.

[21] Nevertheless, it would not be entirely difficult to review the sentencing, as the facts are not in dispute.

[22] Sentencing, in the words of Raus Sharif PCA, in *Nor Afizal Azizan v. PP (supra)*, is one of the most difficult part of the work of a judge. There are many factors that a judge has to consider before passing a sentence.

[23] The duties of a court sitting to hear an appeal against a sentence are established. The Supreme Court, in *PP v. Mohamed Nor & Ors* [1985] 1 LNS 25; [1985] 2 MLJ 200b (SC), held that at the forefront of all the guiding principles, is that an appellate court should be slow to interfere with the sentence passed by the trial court, unless it was manifestly wrong, in the sense of being illegal, or of being unsuitable to the proved facts and circumstances. The apex court had also held, that it is not sufficient for the court hearing the appeal to interfere, on the mere fact that it would have passed a different sentence from the trial court.

[24] I noted that the trial had only concluded in 2014, some five years after the offences were committed. The first appellant was 19 years old, and the second appellant 17, when the offences were committed. They were both 24 and 22 years old respectively when sentenced. They had already spent close to a year in prison, by the time the appeal came before this court.

[25] As both appellants have reached an age of maturity, it will be an exercise in futility, to consider any relevant provisions pertaining to a youthful offender or a child.

[26] Counsel for the appellants had relied heavily on *Nor Afizal Azizan v. PP (supra)*, and had urged this court to pass a similar sentence. I am of the view, that no cases can set a fixed barometer for any crime. Decided cases should be used as guideline, such as observing the trend of sentencing. The discretion however, lies with the sentencing court, and would depend on many variable factors unique to each case.

[27] In fact, His Lordship Raus Sharif PCA, in the *Nor Afizal Azizan (supra)* had set out the following caveat:

> For completeness, we would like to add a proviso to our decision: that whatever sentence to be imposed on this type of cases must be based on the facts of each individual case. Each case depends on its own facts and it is neither feasible nor desirable to attempt to lay down any fixed sentence that is meant to govern this type of cases. Therefore, these observations made by this court should not be misconstrued as intending to have blanket application or applying to all cases involving young offenders charged with the similar offence as the appellant herein.

[28] Rape, is a most heinous crime, as it is a crime committed against the weaker gender. It is viler when committed against a minor, and the punishment must reflect the severity of the offence.

[29] Learned counsel for the appellants' insinuation that the victim in this case was a voluntary participant carries little weight. Sex with a minor is a crime, and that consent should not vitiate the gravity of the crime.

[30] A similar plea for mitigation was also put forward to the Court of Appeal in *Peilis Sami v. PP* [2014] 6 CLJ 670. The terse response from the Court of Appeal merits a reproduction:

> In this plea of mitigation the appellant also said that the complainant have had sexual experiences with other men. We are perplexed that this had to be said by the appellant. We consider it rather mischievous for the appellant to have had the audacity to make such a statement in the course of making a plea in mitigation, to say the least. By making such an allegation, far from attracting the sympathy of this court towards the appellant, it only gives the impression, that there is no feeling of remorse or shame or sympathy on the part of the appellant for what he had done.

Conclusion

[31] Rape against minor has seen an upsurge in recent times. What is deemed worrying is that some of these acts were consensual. A message must be sent out to the public, that statutory rape will result in a heavy sentence. This should serve to deter others from considering of committing the crime. Public interest should be foremost; *R v. Kenneth John Ball* (1951) 35 Cr App R 164.

[32] In *Peilis Samy v. PP (supra)*, the Court of Appeal had also taken judicial notice, on the rampancy of statutory rapes. Hishamudin Mohd Yunus JCA in delivering judgment for the Court of Appeal, had this to say:

> Now, on the question of deterrence, let it be said here that we take judicial notice that statutory rapes are rampant nowadays. Therefore, we consider it to be our solemn duty that by this judgment we should take the opportunity to issue a message to the public. So, we have this to say. The courts in considering what ought to be the appropriate sentence in

cases of statutory rapes must never for a moment lose sight of the fact that they have a duty to protect young girls such as the complainant in the instant case from unscrupulous men such as the appellant, always on the prowl to take sexual advantage of female minors. Hence, the courts must take a stern view of such offences, in an passing out sentences. The court must give out the correct message to the public, that the courts view such offences with much detestation.

[33] I had for the reasons set out, dismissed the appeals and maintained the decision by the Sessions Court.

[34] Finally, I find it necessary to mention that the welfare report should been done and made available before the sentencing by the Sessions Court. To produce it at the appeal stage lends little weight, as the trial court did not have the opportunity to consider it before passing down the sentence.